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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

Eugene Division

UNITED STATES OF AMERICA,	)	NO. **CR 10-60066-HO**
	)	
Plaintiff,	)	**DEFENDANTS' REPLY TO**
v.	)	**UNITED STATES' RESPONSE TO**
	)	**DEFENDANTS' OCTOBER 4,**
STEVEN DWIGHT HAMMOND, and	)	**2011 MOTION TO CONTINUE**
DWIGHT LINCOLN HAMMOND, JR.,	)	**TRIAL DATE**
	)	
Defendants.	)	

SUMMARY OF REPLY

1. The Volume and Timing of Discovery Requires a Delay of the January 17, 2012 Trial Date

Initial discovery provided shortly after arraignment was voluminous, yet incomplete. Its volume alone created challenges; those challenges were exacerbated by the absence of internal organizational information.[1] Yet despite its volume, it appeared to be incomplete; it did not include information and data that the defense understood would have been generated in the course of identifying, controlling, and/or suppressing rangeland fires.

The defendants brought these problems to the government's attention informally in late 2010 and early 2011, but were unsuccessful in securing the additional information they sought. They then raised these concerns formally through substantial and detailed discovery motions filed in April and June, 2011. The government continued to dismiss defendants' complaints until mid-summer, 2011, when it finally acknowledged that they had some validity. Following a meeting on June 20, 2011, the government provided approximately 2,500 pages of administrative records regarding the management and use of Hammond Ranches, Inc.'s allotments on Steens Mountain. On July 26, 2011, it produced approximately 500 pages of grand jury testimony and records related to the

[1] The indictment accuses defendants of intentionally and maliciously igniting eight rangeland fires over a period of 24 years. Initial discovery was produced without organizational dividers, indices, photo logs, and similar information essential to figuring out what discovery related to which fire.

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Granddad Fire. However, it continued largely to dismiss defendants' complaints about the lack of organizational guidance in the discovery of the absence of records that should have been created in connection with rangeland fire activity.

The government finally acknowledged the legitimacy of the defendants' complaints and concerns during an August 11, 2011 hearing before Magistrate Judge Coffin. As to the organizational deficiencies, Assistant United States Attorney Frank Papagni advised the Court that Cheryl Root, a paralegal in his office:

> is organizing it so we can make heads or tails of a lot of this discovery. * * * And now that Ms. Root is on it, I think it's getting organized. And some of the frustrations that she said she's experiencing, I'm sure the defense has.

As to its incompleteness, Mr. Papagni advised the Court that substantial additional records, notes, and reports would be forthcoming. However, he also advised that this would not be accomplished for some time:

> I don't see us getting them [the defense] everything they need for a trial in this case, if I was on their side of the bar, until late September.

The government thereafter provided internal organizational information that rendered the original discovery more comprehensible. On September 27, 2011, it also produced approximately 12,000 pages of new material regarding, *inter alia*, weather conditions, incident reports, and fire suppression activity regarding many of the rangeland fires referenced in the indictment. Unfortunately, a significant amount of this material [six CDs] was provided in a propriety format that the defense has been unable to access.

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The defense understands that these CDs contain information regarding the use of resources and other information about these rangeland fires. If so, the defense believes the data on these CDs will prove to be both substantial in volume and significant in reconstructing the origin and cause of the fires at issue in this case. As of the date of this Reply Memorandum, the defense is awaiting a response from the government to its request either for information necessary to access these CDs or for it to be reproduced in a standard digital format.

Because of the volume and timing of discovery, defendants cannot adequately prepare for trial by January 17, 2012.

2. The Conflict in Defense Counsel's Trial Schedule Requires a Delay of the January 17, 2012 Trial Date

After the parties discussed certain discovery and other issues with Magistrate Judge Coffin on August 11, 2011, the parties and the Court agreed that a continuance of the October 5, 2011 trial date was necessary. After consulting Judge Hogan's calendar, the Court proposed a January 17, 2012 trial date. Counsel for Steven Dwight Hammond advised the Court that he was scheduled to be in trial in a state court case at that time, but would try to reschedule it. Thereafter, he diligently sought to do so, but was unsuccessful. This pre-existing conflict requires postponing the trial in this case.

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LEGAL DISCUSSION

1. The Volume and Timing of Discovery Requires a Delay of the January 17, 2012 Trial Date

Defendants do not believe it necessary or appropriate to reiterate the points they have made both in writing and in the several hearings before Magistrate Judge Coffin regarding the difficulties they have experienced in securing meaningful, complete, and usable discovery. Suffice it to say that although substantial volumes of material was produced by the government shortly after arraignment, meaningful, complete, and usable discovery remains a work in progress as of the date of this memorandum. Not only did the government only recently produce a very substantial amount of crucial discovery [including information defendants have been asking for for nearly a year regarding fire and fire suppression activity in the Steens Mountain area during the relevant portions of the 24 years covered by the indictment], but a substantial amount of that discovery was produced in a manner that is inaccessible to the defense. Six of the CDs are labeled "ISUITE Backups." The defense is unable to read these discs and has requested additional information from the government about them. According to an on-line User Manual for this program, it is an "an Incident tracking system for natural disasters." The I-Suite website describes the program as an application that "consists of a Resource, Cost, Time, Incident Action Plan, and Supply Units." The site further indicates that the "National Wildfire Coordinating Group's (NWCG) Incident Business Practices Working

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Team (IBPWT) and Information Resource Management Working Team (IRMWT) recommended to NWCG that I-Suite be supported as the interim incident base automation tool until such time as a formal incident base automation project is executed."

From these descriptions, defense counsel believe substantial significant data exists on these discs regarding the origin and cause of the grassland fires at issue in this case. They also believe that at least one site visit to the various fire locations will be required for the defense to make meaningful use of this information. It will not be possible to make such a visit before the January 17, 2012 trial date, because winter weather conditions are already setting in and they render it impossible to access the relevant areas. For these reasons alone, defendants cannot adequately prepare for trial by January 17, 2012.

In addition, however, they feel compelled to contest the recent assertion by the government that this is not a complex case. This is not only contrary to the government's position since arraignment when the case was declared complex [July 12, 2010 Minute Order, Doc No. 6], but the scope and nature of the charges in the indictment and the volume and contents of discovery. The indictment alleges that the defendants are responsible for eight rangeland fires over a 24-year period. Virtually none of these fires was investigated as or attributed to human cause at the time they occurred. On the contrary, the government's "evidence" regarding these fires consists primarily of long-after-the-fact interpretations by persons the government intends to qualify as "experts."

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Included among the 105 potential witnesses on the government's First Trial Witness List [Document No. 33] are the following:

(a) Joe Flores, Human Tracker, described in the discovery as graduating from the Tactical Tracking Operations School and having 11 years experience tracking people;

(b) Daniel Gonzalez, Oregon State Wildlife Habitat Biologist;

(c) Janice Madden, USFS Fire Cause Investigator;

(d) John Megan, USFWS Fire Cause Investigator;

(e) Fred McDonald, BLM Range Conservation Supervisor;

(f) Chuck Miller, Oregon Dept. of Forestry Fire Investigator;

(g) Steven F. Morefield, BLM Deputy Fire Management Officer;

(h) Marvin L. Plenert, Former Regional Director, U.S. Dept. of the Interior;

(I) Jeffrey Rose, Fire Ecologist;

(j) Dwight S. Williams, FAA Chief Regional Counsel; and

(k) John Bird, West Virginia Division of Forestry Fire Investigator.

Defendants will be unable to effectively confront these experts without additional time to digest and review with their own experts the additional data that is only now being produced by the government.

In its opposition to defendants' motion to continue the trial, the government asserts that its case relies primarily on eyewitness testimony. Discovery contradicts this assertion. It reveals a single instant of "eyewitness" evidence - a BLM fire suppression employee

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observing Dwight Hammond on the second day of the massive, lightning-caused 2006 Granddad Fire in the vicinity of what a government expert is expected to assert was an ignition point. There is no "eyewitness" to the numerous other ignition points within the 2006 Granddad Fire. There is no "eyewitness" to the ignition of any of the other seven fires over 24 years that the government is now attempting to attribute to defendants. This is not an "eyewitness" case.

The nature and scope of the allegations of the indictment and the discovery problems that have plagued this case render it unreasonable to expect or require defense counsel to be able to render constitutionally effective assistance to their clients by January 17, 2012. For this reason alone, defendants are entitled to a continuance of the current trial date.

2. The Conflict in Defense Counsel's Trial Schedule Requires a Delay of the January 17, 2012 Trial Date

In its Response to defendants' motion to continue the trial date, the government correctly acknowledges that counsel for Steven Dwight Hammond advised Magistrate Judge Coffin on August 11, 2011 that he was scheduled to be in a state court trial in mid-January, 2012. It also correctly acknowledges that counsel for Steven Dwight Hammond agreed to seek to have that case reset to accommodate a mid-January trial date in this case.

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The record is clear that counsel thereafter diligently sought to reset the state court case. *See* October 4, 2011 Declaration of Lawrence Matasar [Re: Defendants' Motion to Continue Trial Date; Document No. 46]. It is also clear that the judge in that case simply decided that its age and nature required it to proceed to trial as scheduled. *See* Exhibit A to October 4, 2011 Declaration of Lawrence Matasar [Re: Defendants' Motion to Continue Trial Date; Document No. 46-1].

The government now seeks to discount counsel's conflict by questioning his role in the representation of his state court client. It does so by reporting that the state court prosecutor reports that she has dealt primarily with Krista Shipsey during scheduling and other preliminary matters. Ms. Shipsey was an associate in counsel's firm when he was retained to represent his client and is now his partner.

The defendants in this case do not see the relevance of the state court prosecutor's report. Preliminary court appearances and/or correspondence by one lawyer in a firm does not provide any insight into the substantive representation of a client, the agreement between the client and the firm, or the roles of the lawyers at trial. As to those matters, the hearing on this motion will establish the following:

Arick Sundberg was indicted in early 2006 for sexual offenses. *State v. Sundberg*, Linn County Circuit Court No. CC 05102194. *See* OJIN case history appended hereto as Exhibit B. He was tried, convicted, and sentenced in April, 2007. Shortly after his conviction, his family contacted Mr. Matasar to appeal this conviction.

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Due to the press of other business, Mr. Matasar referred them to Dennis Balske, an attorney who shares office space with Mr. Matasar. Mr. Sundberg's conviction was reversed on appeal. *See State v. Sundberg*, 349 Or. 608, 247 P.2d 1213 (2011).

Mr. Matasar followed the progress of the case during the appeal. When Mr. Sundberg's conviction was reversed, the family asked Mr. Matasar to represent him at the re-trial. Mr. Matasar and his then-associate, Krista Shipsey, agreed to do so. The family specifically requested and the retainer agreement specifically provided that Mr. Matasar would personally and actively participate in Mr. Sundberg's re-trial. Thereafter, Mr. Matasar and Ms. Shipsey met with Mr. Sundberg, who reiterated the understanding and expectation that Mr. Matasar would personally and actively participate in his re-trial. This understanding and expectation was not surprising; Ms. Shipsey is an excellent lawyer, but Mr. Matasar is senior to her, has substantial experience representing clients accused of sex offenses at trial and on appeal, and is a recognized expert in this field. *See, e.g. Simpson v. Coursey*, 224 Or. App. 145, 150, 197 P.3d 68, 197 P.3d 68 (2008); *Gorham v. Thompson*, 332 Or. 560, 565, 34 P.3d 161 (2001). *See also In re Gustafson*, 327 Or. 636, 968 P.2d 367 (1998).

After being retained by Mr. Sundberg and his family, Mr. Matasar actively participated in the preparation of the defense. Since March, 2011, he has reviewed police reports, drafted pretrial motions, developed and discussed trial strategy with Ms. Shipsey, and interviewed potential expert witnesses. Although Ms. Shipsey has appeared at

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scheduling conferences or other preliminary proceedings, Mr. Matasar will actively represent Mr. Sundberg at trial.

Following the August 11, 2011 hearing before Magistrate Judge Coffin, Mr. Matasar made a prompt and good faith effort to persuade the Linn County Circuit Court to reset Mr. Sundberg's trial. *See* Exhibit B. That effort was unsuccessful through no fault of Mr. Matasar's.

That it was unsuccessful, however, mandates the postponement of the Hammond trial. Both Mr. Sundberg and Steven Hammond have the constitutional rights to counsel of choice[2] and continuity of counsel.[3] If both the Sundberg and Hammond trials take place in mid-January, 2012, the constitutional rights of one of these men will be denied. Denying a continuance of the Hammond case under these circumstances would be an abuse of discretion. *United States v. Nguyen*, 262 F.3d 998 (9th Cir. 2001); *See also United States v Garnett*, 179 F. 3d 1143, 1147 (9th Cir. 1999) ["[w]hen a motion for a

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[2] A defendant who can hire his own attorney has the independent and distinct right to be represented by the attorney *of his choice. See United States v. Gonzalez-Lopez*, 548 U.S. 140, 147-48, 126 S. Ct. 2557, 165 L. Ed.2d 409 (2006); *United States v. Rivera-Corona*, 618 F.3d 976, 979, 618 F.3d 976 (9th Cir. 2010).

[3] Even an indigent defendant, who has no right to counsel of choice has the right to continuity of counsel once the attorney-client relationship has been established. *See United States v. Bergeson*, 425 F.3d 1221, 1226, 425 F.3d 1221 (9th Cir. 2005). The denial of a continuance that results in the defendant's loss of counsel of choice violates the defendant's Sixth Amendment right to counsel. *Childs v. Herbert,* 146 F. Supp.2d 317, 323 (S.D.N.Y. 2001); *Linton v. Perini,* 656 F.2d 207 (6th Cir. 1981).

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continuance arguably implicates a defendant's Sixth Amendment right to counsel, the court must consider the effect of its decision on this fundamental right."]

CONCLUSION

For each of the reasons set forth above, the Court is respectfully urged to grant Defendants' Motion to Continue Trial Date.

Dated this 24th day of October, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing DEFENDANTS' REPLY TO UNITED STATES' RESPONSE TO DEFENDANTS' OCTOBER 4, 2011 MOTION TO CONTINUE TRIAL DATE on the following attorneys:

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by electronic file notice of a true copy on the 24th day of October, 2011.

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